

1987

Allstate Enterprises, Inc. v. Glenn William Heriford, heritage Motors, and Western Surety Company : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870370-CA

STATE OF UTAH COURT OF APPEALS

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ALLSTATE ENTERPRISES, INC., :

Plaintiff, :

vs. :

GLENN WILLIAM HERIFORD, :
HERITAGE MOTORS, and :
WESTERN SURETY COMPANY, :

: Docket No. 870370CA

: Argument Priority No. 14-b

Defendants. :

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APPELLANT'S BRIEF

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Appeal from the Judgment of the
Fourth Judicial District Court of Utah County
State of Utah

Honorable Boyd L. Park

--ooo0ooo--

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Attorneys for Respondent

DEC 10 1987

COURT OF APPEALS

STATE OF UTAH COURT OF APPEALS

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ALLSTATE ENTERPRISES, INC.,	:	
Plaintiff,	:	
vs.	:	
GLENN WILLIAM HERIFORD,	:	Docket No. 870370CA
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WESTERN SURETY COMPANY,	:	
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LIST OF ALL PARTIES

1. Allstate Enterprises - Plaintiff
2. Glenn William Heriford - Defendant
3. Heritage Motors - Defendant
4. Western Surety Company - Defendant
5. Western Surety Company - Third Party Plaintiff/Respondent
6. Jan L. Heriford - Third Party Defendant
7. Joseph F. Ollivier - Third Party Defendant/Appellant
8. Linda S. Ollivier - Third Party Defendant

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STATEMENT OF THE ISSUES

1. Whether the trial court erred in not strictly construing the ambiguity in the indemnification agreement against the drafter of the agreement.
2. Whether the trial court erred in not strictly construing the ambiguity in the indemnification agreement against Western Surety, who was a surety for hire.
3. Whether the trial court erred in not ruling that the contract ended when appellant withdrew from the business.

STATEMENT OF THE CASE

A. NATURE OF THE CASE:

This is an action by a financing institution against an automobile dealership, its owner, and its bonding company to recover a loss incurred by the financing company concerning an automobile sale. The surety filed a third party complaint against the appellant for indemnification for any loss the surety company might sustain on the bond. The first party complaint was settled before trial and the third party complaint regarding the validity of the indemnity agreement was heard on May 7, 1987 before the Honorable Boyd L. Park. The court rendered judgment against third party defendant and in favor of the surety company. It is from that judgment that third party defendant appeals.

B. STATEMENT OF THE FACTS

On December 1, 1978, Western Surety issued a Motor Vehicle Bond to Herf's Heritage Motors Inc. (See Bond).

Joe Ollivier was one of the names signed on the bond as an indemnitor but Mr. Ollivier has no recollection of signing the application for the bond but does admit that it looks somewhat like his signature. (Trans. p. 104).

Mr. Ollivier does not believe that he signed the document (Trans. pp. 109-112). The court found that Joe Ollivier did indeed sign the application for Bond (Trans. p. 135).

The Bond contained no language concerning the procedure one must follow to withdraw as an indemnitor. (Trans. p. 136).

The Judge found that the indemnity agreement was still in force and that Mr. Ollivier because of his business knowledge should have known that he had to give notice to

Western Surety to withdraw, even though the application for Bond was silent on that point. (Trans. pp. 136, 137).

SUMMARY OF THE ARGUMENTS

In 1978, third-party defendant Joseph F. Ollivier, signed a dealer indemnity bond on behalf of Heritage Motors and Western Surety. At the time, Mr. Ollivier was a minority interest owner in Heritage Motors. The indemnity bond did not contain any instructions as to the duration of the agreement or to the terms of its termination. Three years prior to Heritage Motors bringing suit against Mr. Ollivier and Allstate Enterprises, Inc., Mr. Ollivier had sold any and all interest he had in Heritage Motors. Mr. Ollivier, who had no memory of signing the indemnity agreement, did not notify Western Surety of the termination of his business interest with Heritage Motors.

This Court has long held, as has a majority of courts, that the terms of an ambiguous agreement are to be construed against the drafter of the agreement. Any ambiguity in the agreement, has in this Court and the majority courts, been resolved in favor of the non-drafting party to the agreement. This Court has further held that a contract for a surety for hire should be strictly construed against the surety. These notions are well settled and set forth good law for which third-party defendant, Joseph F. Ollivier, herein relies. A correct application of these notions to our present fact situation absolves Mr. Ollivier of the adverse judgment from the lower court.

ARGUMENT

POINT I

**ANY UNCERTAINTY WITH RESPECT TO CONSTRUCTION OF A CONTRACT
SHOULD BE RESOLVED AGAINST THE PARTY WHO HAS DRAFTED THE
AGREEMENT.**

The well established rule in Utah is that any uncertainty with respect to construction

of a contract should be resolved against the party who has drawn the agreement. Sears v. Riemerssman, 655 P.2d 1105 (Utah 1982), Matter of Estate of Orris, 622 P.2d 337 (Utah 1980), Microbiological Research Corp. v. Muna, 625 P.2d 690 (Utah 1981), Skousen v. Smith, 493 P.2d 1003 (Utah 1972). The signed dealer indemnity bond in our present case was uncertain in regard to its duration and terms of termination.

The trial court in its findings at the end of the trial stated:

. . .the only thing that really bothers me a little bit in here is that normally in these areas where there is ripe for one to escape where you [are] indemnitor, there is language which says that you are an indemnitor only until such point and time as you say that you no longer want to be an indemnitor and you withdraw that indemnity. That language is not contained in this particular agreement, that bothers me, that is my most difficult hurdle to get over. However, in view of the education of Mr. Ollivier and in view of his business experience I am going to have to decide that [in] favor of the bonding company Western Surety. Trans. p. 136, 137

It is clear from this passage that the trial judge construed the ambiguity in the contract against Joe Ollivier and not against the drafter Western Surety; this is directly in opposition to current Utah case law.

The respondent, Western Surety, holds the control over this situation. They drafted the agreement and were responsible for the language that was contained in the contract. They had the power to set the rules and it is against public policy and existing case law to punish Joe Ollivier for their poorly drafted contract. According to the trial court's interpretation of the agreement in question, Mr. Ollivier would have been liable to Western Surety indefinitely. In order to impose this type of far-reaching liability in favor of Western Surety the law should require clear notice and intent to Mr. Ollivier. In this case the contract was silent as to the length of the obligation, and also the procedure for

terminating the contract, therefore the contract should be construed against the drafter and in favor of Mr. Ollivier.

POINT II

WHERE A CONTRACT IS SILENT AND THE PARTIES' INTENT CANNOT BE ASCERTAINED THE PARTIES ARE BOUND FOR A REASONABLE TIME.

The majority rule, and the one which had been followed in those courts surrounding the jurisdiction of this Court, is that where a contract is silent and the parties' intent cannot be ascertained, and the performance has been rendered, the parties are bound for a reasonable time. Shultz v. Atkins, 554 P.2d 948 (Idaho 1976). To determine whether a contract has been performed for a reasonable time we must examine the subject matter of the contract, the relationship of the parties and the circumstances surrounding the transaction. Tavel v. Olsson, 535 P.2d 1287 (Nev. 1975). Where the record does not clearly establish the circumstances surrounding the transaction, the subject matter and relationship of the parties is important. However, at the time that Mr. Ollivier signed the indemnity agreement, he held a part interest in the business associated with the bond. Having an interest, it was only reasonable that he too would have some liability. At the time that the claim of the indemnity arose, Mr. Ollivier's relationship to the parties had changed; Mr. Ollivier had severed all ties with the business three years prior to the incidents surrounding the claim in this lawsuit. The bond and indemnity agreement which had to be renewed yearly should not have been applicable to Mr. Ollivier beyond the last year that Mr. Ollivier maintained any relationship to the business.

Considering the circumstances surrounding this contract, it is logical and reasonable to rule

that Mr. Ollivier's contract for indemnity ended at the end of the year he withdrew from any ownership interest in the business.

The trial court in this case, by its ruling, imposed a duty as a matter of law on Joe Ollivier to notify Western Surety of his withdrawal from the business. It is Joe Ollivier's position that any obligation of notice should be imposed by contract between the parties and not as a matter of law; the reason being that Joe Ollivier was unaware of a duty to notify the surety company and there was no way for him to have been aware of that duty absent the plain language of the contract.

Western Surety argued at trial and the trial judge seemed to agree (See Trans. p. 136) that a Surety Company shouldn't have to require annual checks on their indemnitors. Joe Ollivier strongly disagrees and proposes that at the very least the Surety Company must make it clear by their contract what the indemnitors duties and liabilities are. In fact, Kent Blackley, an agent of Western Surety testified that some companies require a new financial statement every two or three years in order to check on their indemnitors (Trans. p. 58).

It is appellant's position that a surety company must control its procedures through clear contractual language or if the contract is ambiguous, such as in this case, it is the surety company's duty to discover any change of circumstances beyond the one year period of the initial premium. It is clear in this case that to impose a duty on appellant for indemnity, three years after he withdrew from any interest in the business and seven years after he allegedly signed the application for bond, is unreasonable and contrary to case law.

POINT III

A CONTRACT OF A SURETY FOR HIRE IS TO BE STRICTLY CONSTRUED AGAINST THE SURETY

To aid in the interpretation of the meaning, force and effect of the language of this bond, appellant appeals to a rule of construction set forth by this Court: "Our own court is committed to rule that the contract of a surety, for hire, is to be strictly construed against the surety." Dennis Dillon Oldsmobile G.M.C. Inc. v. Zdunich, 668 P.2d 557 at 560 (Ut. 1983).

This Dillon case concerned an action by an injured party against the bond and did not involve the indemnitor as in this case. However, the reasoning and logic are the same. The bonding company is paid a premium to act as a surety for the people who deal with the automobile dealership. Inherent in this relationship is a certain amount of risk on the part of the surety. In order to take that risk the surety requires the payment of a fee. The surety company can minimize their risk by controlling many variables including but not limited to, the language of the contract, accepting or rejecting the risk, the rate of the premium and selection of the indemnitors. Because the surety controls all these factors, the courts have strictly construed the contracts against the sureties.

In this case Western Surety controlled the circumstances surrounding the contract. Joe Ollivier was unaware of any procedure he must follow to withdraw from the indemnity relationship. Western Surety, who controlled the drafting of the documents and received a premium for its service, should at the very least be required, as part of the contract, to

clearly spell out the obligations and liabilities of the parties. To construe this agreement any other way then against the surety company is clearly against existing Utah case law.

CONCLUSION

The case law in this jurisdiction is clear regarding the two important issues in this case. First, that a contract, if ambiguous, should be construed against the drafter of the agreement; and second that a contract for a surety for hire is to be strictly construed against the surety. In the present case, Western Surety is both a surety for hire and the drafter of the agreement in question and therefore any ambiguity in the agreement should be strictly construed against them. Despite this clear case law the trial court construed the ambiguity against Mr. Ollivier and in favor of Western Surety. Consequently, the trial court has erred as a matter of law and this court should respectfully reverse the lower court.

DATED this _____ day of November, 1987.

YOUNG & KESTER

ALLEN K. YOUNG
Attorney for Appellant J. F. Ollivier

ADDENDUM

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2. Transcript p. 104	A-2
3. Transcript pp. 109-112	A-3
4. Transcript p. 135	A-7
5. Transcript pp. 136, 137	A-8
6. Transcript p. 58	A-10

**THE COM-
MUNIST PARTY
OF THE U.S.A.**

Name _____
 Address _____
 City _____
 State _____
 Zip _____
 Phone _____
 E-mail _____
 Fax _____
 Signature _____
 Date _____

APPLICATION FOR BOND—ANY KIND
IMPORTANT

Attach explanatory letter
If you feel Surety should have additional information.
COMPLETE SECTION 10 ON BACK PAGE FOR ALL BONDS

Individual
Partnership
Corporation

Name of Applicant Herf's Heritage Motors, Inc. Age _____ Corporation ☒

(For co-partnerships, give full names of partners and (trade name)

Address 209 So Univ Ave 1000 4477
(Street and Number) (City) (State)

Amount of Bond \$ 20,000 Effective Date 12-1-78 19 78 H.V. Dealer Bond St. of Ill.
(Give this section or description of bond)

(Give exact and complete name of Obligor)

(Address of Others)

Applicant's occupation or business Used car dealer How long engaged? 3 yrs 2339

Single ☐ Married ☐ Divorced ☐ Alimony Payments \$ _____

nt of applicant's Assets and Liabilities as of 10-1-1978 19 1978 (Complete carefully)

CHECK APPLICABLE SECTION ON FOLLOWING PAGES FIRST TO SEE IF THIS FINANCIAL STATEMENT IS NECESSARY

IMPORTANT: FOR CONTRACTORS USE FORM 50

ASSETS		LIABILITIES	
Cash deposited in following banks:		Accounts Payable	
Bank		Taxes due - Gas	
Bank		Taxes due & accrued - Income	
Bank		Taxes due - Others	
Accounts Receivable		Notes Payable to Bank	
- Debit		Notes Payable - Small Business Adm. Loan	
- Debit		Notes Payable to Relatives	
- Debit		Notes Payable to Others	
- Receivable		Mortgage on Real Estate	
Merchandise or Material in Stock		Mortgage on Real Estate	
Real Estate, Homestead	A	Other Liabilities - Debit	
Real Estate, held as investment	B		
Furniture and Fixtures		TOTAL LIABILITIES	
Other Assets - Debit		Capital Stock (Paid in)	
		Surplus or Net Worth	
TOTAL ASSETS		TOTAL	

The undersigned applicant and indemnitors hereby request WESTERN SURETY COMPANY, (the Company) to become surety for and furnish the bond and such other bonds as may now or hereafter be required by us on behalf of the applicants.

[illegible]

If the bond applied for is a contract or performance bond then the applicant does hereby assign, transfer and convey to the Company any and all money now due or hereafter to become due under and contract, including all deferred payments and retained percentage, all supplies, stock, parts, equipment and materials now on or hereafter used upon and work. No notice of the acceptance of this by the Company is required. The amount of a fee paid by the Company shall not oblige the Company to issue a contract, performance or any other bond required if applicant's bid is accepted.

The Company may decline to become surety on any bond of the applicant, and in case it does act as surety shall have the right to withdraw or discontinue whenever it shall see fit; and in any event the Company shall not be required to disclose the reason upon which its action is based, and shall not be responsible for any loss or damage that may be sustained by reason of such action. Without notice to the applicant or its sureties, the Company at any time may increase or decrease the penalty of any bond of the applicant, or may change the terms or conditions of any such bond and the agreement of the surety to any such bond as is altered.

Agent Blackburn, Joe

Serial No. 2021-2000

City San FranciscoState _____ Zip Code 21001

Signed this _____ day of _____, 19____
 PRC2.040T *William Raymond*
 VPO *Robert A. D. Haddock*

Indonesian

IMPORTANT - COMPLETE NAME ON LAST PAGE

IF BOND IS ONE CLASSIFIED ONLY LEAF, BE SURE TO COMPLETE APPLICABLE SECTION ON FOLLOWING PAGE 36

1 court has it. Does the signature appear to be yours on
2 Exhibit No. 3 and Exhibit No. 5?

3 A I don't remember signing it but it looks like my
4 signature yes.

5 Q Going back to 1978 you probably signed a lot of
6 documents didn't you that year?

7 A In conjunction with my brokerage business
8 when someone opened a new account I just signed documents
9 almost on a daily basis there.

10 Q If I were to get those from you you could remember
11 having signed each one of those independently?

12 A No not independently.

13 Q So we would have to ask you and would have to
14 ask you on those does that appear to be your signature and
15 if it was you tell me "yes" or "no" and that will be the
16 way we authenticate it right?

17 A Yes I would have to say "yes" that looks like my
18 signature yes sir.

19 Q And unfortunately we are not computers, and
20 memory fails after a few years particularly when it comes
21 to documents you would agree with that wouldn't you?

22 A Depends on the significance of the document I
23 would think.

24 Q If you signed this particular document do you
25 think you would remember it Exhibit No. 3?

1 Q Did you ever notify anyone and I mean "the world"
2 that you were no longer willing to serve as an indemnitor
3 under the Western Surety Bond that they issued?

4 A I had no knowledge of the bond so no I wouldn't
5 have know to notify anybody.

6 Q Okay, this disassociation of yourself with Heritage
7 Motors happened in 1982, did you continue to have any
8 relationship with Heritage Motors since then?

9 A Not with the company. I have seen Mr. Heriford
10 on occasion.

11 Q Do you have any financial interest in the company
12 at all?

13 A No.

14 Q Okay, I think that is all I have Your Honor.

15 THE COURT: All right, do you wish to cross
16 examine?

17 MR. YOUNG: Thank you Your Honor.

18 CROSS EXAMINATION

19 BY MR. YOUNG:

20 Q Joe, Mr. Plant asked you some questions about this
21 Application for Bond are there some reasons that you believe
22 that in fact you did not sign that document?

23 A My reasons would be that the only liability that
24 I understood to have or that I ever talked with Mr. Heriford
25 about would be with Zions Bank which was my primary reason

1 for helping him get in business he needed my financial
2 strength at the bank to get flooring line that was secured.

3 Q And in that regard did you ever execute any
4 instrument on behalf of Heritage that was not presented to you
5 at Zions Bank?

6 MR. PLANT: Well - -

7 THE WITNESS: Not to my knowledge no.

8 MR. PLANT: I am sorry.

9 BY MR. YOUNG:

10 Q Were you secured in the flooring that you executed
11 as coguarantor with Zions Bank?

12 MR. PLANT: Objection leading.

13 MR. YOUNG: This is cross examination.

14 THE COURT: Well he is called as an Adverse
15 Witness I suppose.

16 MR. YOUNG: All right, let me withdraw the
17 question.

18 BY MR. YOUNG:

19 Q What was the situation between Zions Bank and you
20 and Heritage Motors with regard to your guarantee?

21 A My guarantee with Zions was for a flooring line
22 as Zions Bank held the titles to the cars, inspected
23 them once a month to make sure that they were where they
24 were supposed to be if they were in the process of being
25 sold or transferred or they were on the lot.

1 Additionally there was , Zions led me to believe that
2 when Mr. Heriford started having some trouble with the
3 company that I was also responsible for loans that Zions
4 had made to cars that had been sold from Heritage Motors
5 that were possibly not to be covered by a reserve amount.
6 They pursued that for over a year until I finally asked for
7 the actual documents because I did not believe I had
8 signed anything like that and they finally admitted to
9 me that in reality that I had not signed. But they tried
10 very diligently to get me to come and collateralize
11 some insecured loans that they had.

12 Q Now they communicated with you annually or more
13 often the bank?

14 A I had to have a new financial statement once a year
15 to them.

16 Q And that is the way you dealt with them?

17 A And I knew the banker and Bill dealt with him as
18 he came around to inspect the cars once a month a man
19 named Dan Openshaw and I knew him.

20 Q Is there anything else about that document that
21 makes you believe you in fact didn't sign it the application?

22 A I am careful what I sign and I do read what I sign
23 and the reason that I believe that I don't remember seeing
24 this or don't believe I signed it is because I would have
25 read it. It calls for a financial statement. That implies

1 right there that there must be some liability and I would
2 have certainly read through and I can't remember the
3 language here but if I would have signed it I would have
4 read it because my liability and I would want to make
5 clear to Mr. Heriford and I think he understood that it
6 was limited only to the flooring line at Zions. That was
7 my reason that I think I put up a small amount of money
8 also but that was the reason for my interest in the
9 company.

10 Q You didn't hold any office with the company is that
11 true?

12 A No just shareholder.

13 Q This statement dated October 1st what was the
14 purpose of that financial statement?

15 A I believe that was a statement that was given to
16 the bank to obtain the flooring line.

17 Q You were never asked by Mr. Heriford to prepare
18 a financial statement to give to Western Surety to become
19 a surety on a bond?

20 MR. PLANT: Objection it is leading.

21 THE COURT: It is leading objection sustained.

22 BY MR. YOUNG:

23 Q Did Mr. Heriford ever ask you to provide a financial
24 statement for any other purpose?

25 A Other than the bank no.

1 in a normal equity case. And a surety is not like a
2 bank. A bank loan is an entirely different animal than
3 one of a surety and an indemnification. Mr. Young has
4 done a fine job of the comparison I don't believe they
5 are the same animal at all.

6 I am concerned and feel some regret because of the
7 circumstances and maybe some who would feel a little
8 different than I would with regard to the case but
9 it appears to me that I have to find that the Application
10 for the Bond contains sufficient language for
11 indemnification and that signatures thereto once they have
12 been accepted by the surety company and a bond has been
13 issued you become fixed and they are an integral part of
14 the bond.

15 I have to believe that it is Mr. Ollivier's signature.
16 I can appreciate that he might not remember it but there is
17 no evidence to the contrary that it is not his signature
18 other than his lack of memory and that he doesn't think
19 he would have signed such a thing because he doesn't
20 think he would have signed it unless he had read it. He
21 may not have read it but that would not allow him to
22 escape from the terms of the application and the
23 indemnification contained therein because he , if he did
24 in fact sign it, and that is a finding of the court that he
25 did sign it.

1 This is an integral part of starting a business you
2 cannot have an on going business in this State without
3 the bond. He was interested in being a part of this
4 business. He knew he was going to be the financial
5 support whether he signed this in Zions Bank or wherever
6 he may have signed it.

7 I am a bit appalled that Mr. Heriford's memory, that he
8 doesn't remember any of this but then in view of his
9 present position in this situation I guess that is to be
10 expected.

11 I don't find that in bond applications of this sort
12 where their indemnifications or bonds of this sort that
13 there is an obligation upon the surety to make an annual
14 check upon the insured or the people of the State of Utah
15 or whoever it is that has some obligation as long as payments
16 are being made that is pretty much implicit in the
17 Bonding Law. When the payments are being made on an annual
18 basis you don't renew the policy, you don't renew the
19 applications that is a standard procedure and the only thing
20 that really bothers me a little bit in here is that normally
21 in these areas where there is ripe for one to escape where
22 you are indemnitor, there is language which says that you
23 are an indemnitor only until such point and time as you
24 say that you no longer want to be an indemnitor and you
25 withdraw that indemnity. That language is not contained

1 in this particular agreement that bothers me that is my most
2 difficult hurdle to get over. However, in view of the
3 education of Mr. Ollivier and in view of his business
4 experience I am going to have to decide that favor
5 of the bonding company Western Surety.

6 So based on that reasoning and those facts it is the
7 Judgment of this court that Western Surety have a Judgment
8 over against Mr. Ollivier for their amount of money that
9 they are obligated to pay under the bond and for such
10 costs as they have incurred and reasonable attorney
11 fees. Reasonable attorney fees will be submitted by
12 affidavit in accordance with our Administrative Order I
13 think it is I am not sure 25 but I am not sure what it is.
14 You will submit copies to Mr. Young of those affidavits
15 so that he can raise any objections that he feels are
16 appropriate.

17 Also Mr. Plant you will draw the Findings of Fact,
18 Conclusions of Law and Judgment in this matter and submit
19 those to Mr. Young under Rule 2.9 and then to the court.
20 Anything further?

21 MR. PLANT: No Your Honor.

22 THE COURT: This is the first case maybe it will
23 get a test if there is a lot of them out there.

24 MR. YOUNG: Will have to Your Honor.

25 THE COURT: May very well I can understand that.

1 A I then told him that I needed to have the individuals
2 sign this application.

3 Q Did Mr. Heriford ever represent to you that Mr.
4 Ollivier had read this document other than to sign it if
5 in fact he did at all?

6 A No what I simply did was pick up the document and
7 signatures on it.

8 Q Fine. Now Mr. Plant was talking to you about the
9 course of dealing once a bond is issued you are not aware
10 of the fact that Mr. Ollivier terminated all of his
11 interest whatever small it was in Heritage Motors not
12 Herf's Heritage Motors but Heritage Motors Inc., sometime
13 in 1982?

14 A I had no knowledge of that.

15 Q Isn't it true that the as a course of doing
16 business now that the bonding companies generally every
17 two or three years require new financial statements and
18 to determine the stability of the company and the
19 individuals who are guarantors?

20 MR. PLANT: Did you say Western Surety or companies
21 in general?

22 MR. YOUNG: Surety companies in general.

23 THE WITNESS: Some companies do.

24 BY MR. YOUNG:

25 Q Now you testified that to your knowledge Mr. Ollivier

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of November, 1987, two true and correct copies of the foregoing Brief of Appellant were mailed to:

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